83-22

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October TERM 1983

CITY OF ROCKFORD, a Municipal Corporation, and DELBERT PETERSON, individually and as Chief of Police, Rockford Police Department,

Petitioners,

vs.

JOHN KASKE and PAUL A. TRIOLO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

CHARLES E. BOX, Legal Director*
KATHLEEN ELLIOTT, City Attorney
CITY OF ROCKFORD DEPARTMENT OF LAW
425 E. State St., Suite 504
Rockford, IL 61104
(815) 987-5549

Attorney for Petitioner

*Counsel of Record

Date: July 7, 1983

QUESTIONS PRESENTED

1. Whether the order of a police chief to a police officer to undergo a polygraph examination regarding a question of serious misconduct, such as the use of illegal drugs, violates the officer's Fifth Amendment or other constitutional rights.

2. Whether the Supreme Court of Illinois violated the doctrine of separation of powers in adopting a rule banning the executive branch from disciplining police officers who disobey an order from a superior to undergo a polygraph test in the absence of a statute prohibiting such disciplinary action, or evidence and a finding that such disciplinary actions are a violation of the police officers' Fifth Amendment or other constitutional rights.

3. Whether a police officer has a constitutionally protected property interest in his continued employment, and does this interest outweigh the public interest in maintaining the integrity of public employees so as to prohibit a police chief from requiring a police officer to undergo a polygraph test regarding alleged misconduct.

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NO. _____

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The Petitioner respectfully prays that a writ of certiorari be issued to review the opinion of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The decision of the Supreme Court of Illinois, holding that petitioner, Delbert Peterson, chief of police, City of Rockford Police Department, could not under any circumstances order respondents to undergo a polygraph test in connection with a disciplinary investigation, nor bring any disciplinary action against respondents for their refusal to undergo the test, was filed on January 24, 1983. A copy of that decision is attached hereto as Appendix A. The citation to the decision of the Illinois Supreme Court is Kaske and Triolo, et al. v. City of Rockford, etc., et al., 96 Ill.2d 298 (1983). A petition for rehearing was timely filed and was denied on April 8, 1983. A copy of the order denying the petition for rehearing is attached hereto as Appendix B. The opinion of the Second District Appellate Court is not to

be published or otherwise reported pursuant to Rule 23 of the Illinois Supreme Court Rules and is attached hereto as Appendix C.

JURISDICTIONAL STATEMENT

The Supreme Court of Illinois' opinion was filed on January 24, 1983. The Supreme Court of Illinois' order denying the City of Rockford's Petition for Rehearing was filed April 8, 1983. This petition for a writ of certiorari is filed within the time permitted pursuant to 28 U.S.C. Sec. 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Article V of Amendments:

> . . . nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law . . .

Article XIV of Amendments:

Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondents, John Kaske and Paul A. Triolo, were police officers for the City of Rockford, Illinois, police department. In December, 1980, the City of Rockford police department received reports indicating the respondents had been using illegal drugs during the time they had been employed by the police department. The respondents were ordered by petitioner Delbert Peterson, chief of police for the City of Rockford police department, to submit officer's reports concerning these allegations. The respondents submitted reports denying the allegations. Petitioner Peterson then ordered respondents to undergo a polygraph examination on February 2, 1981, as part of a disciplinary investigation concerning the charges.

Respondents then filed a declaratory judgment action on February 2, 1981, in the Circuit Court of the 17th Judicial Circuit,

Winnebago County, Illinois requesting declaratory and injunctive releif prohibiting petitioner Peterson from ordering respondents to undergo polygraph examinations or taking any disciplinary action in any manner as a result of the subject matter in the premises set forth in the complaint.

The circuit court granted petitioner's motion to dismiss respondents' amended complaint and amendment thereto, denied respondents' motion for issuance of a preliminary injunction, and dissolved the temporary restraining order granted on the day the complaint was filed.

Respondents filed an appeal with the Illinois Appellate Court, 2nd District. The appellate court affirmed the trial court's denial of the preliminary injunction and otherwise dismissed the appeal.

The Illinois Supreme Court granted

respondents' petition for leave to appeal and consolidated the case with another case, Collura v. Board of Fire and Police Commissioners of the Village of Itasca. The Collura case involved the admissibility of the polygraph examinations in an administrative disciplinary hearing before the Board. The Illinois Supreme Court reversed the judgments of the appellate and circuit courts, holding that the police chief could not under any circumstances require officers to submit to polygraph examinations and that the officers' refusal cannot be used as a basis for disciplinary charges to be brought against them. Justices Underwood and Moran dissented from this holding of the court.

Petitioners timely filed a petition for rehearing with the Illinois Supreme Court, which was denied April 8, 1983.

REASONS FOR GRANTING THE WRIT

I.

THE ORDER OF A POLICE CHIEF TO A POLICE OFFICER TO UNDERGO A POLYGRAPH TEST ON A QUESTION OF SERIOUS MISCONDUCT, SUCH AS USE OF ILLEGAL DRUGS, DOES NOT VIOLATE THE POLICE OFFICER'S FIFTH AMENDMENT OR CONSTITUTIONAL RIGHTS

In Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), this Court ruled that police officers could not be dismissed for refusing to waive their Fifth Amendment protection against self-incrimination. However, police officers could be dismissed for refusing to answer questions specifically, directly and narrowly relating to the performance of their official duties without giving up their Fifth Amendment rights against self-incrimination.

In the instant case, the Supreme Court of Illinois adopted a rule banning the

executive branch from taking disciplinary action against police officers who disobeyed an order to undergo a polygraph test. The rule extends to all situations regardless of the circumstances. This includes the instant situation of a disciplinary (as opposed to criminal) investigation wherein the respondent police officers were not required to waive their Fifth Amendment protection against self-incrimination and wherein the polygraph test was specifically, directly and narrowly related to a question of serious misconduct, i.e., illegal use of drugs.

Unlike the Court in the instant case, the Fifth Circuit Court of Appeals recently addressed the question of whether the dismissal of city employees for refusing to undergo polygraph tests violated their Fifth Amendment rights. Gulden v. McCorkle, 680 F.2d 1070, 1076 (5th Cir.

1982), cert. denied February 22, 1983, 51 U.S. Law Week 3611. In Gulden, two City of Dallas Public Works Department employees were discharged following their refusal of polygraph tests, requested by their superiors, in connection with a telephoned bomb threat. They claimed that because the defendants failed to tender them immunity in regard to the use of their polygraph answers in subsequent criminal proceedings, they were implicitly required to waive such immunity in contravention of the Fifth Amendment right against self incrimination. They alleged that they were then justified in refusing to take the polygraph tests and could not be discharged for so doing.

The Court of Appeals affirmed the district court in upholding that the plaintiffs were properly discharged for refusing polygraph tests and stated:

> "In conclusion, the discharges imposed upon Gulden and Sage were not imposed because they refused to waive their Fifth Amendment rights to be free from self-incrimination. No explicit or implicit waiver of their right to immunity had been requested of them. Any answers given by them could not, under Garrity, be used against them. Moreover, because the inquiry had not advanced to a level of specificity in which the competing concerns of immunity could be properly addressed, no affirmative duty (if any such duty may ever be found) had developed upon the employer to advise Gulden and Sage that immunity was available. Gulden and Sage were told only that they must take the polygraph exams to retain employment. This was a permissible requirement." (Emphasis Added)

This Supreme Court of Illinois, in the instant case, did not find that the respondents' constitutional rights were violated by the order from the police chief to take a polygraph test. Nor did it find that the test, if taken, would have violated the respondents' constitutional rights.

In fact, no reported decisions have been located by petitioner in which a

court has found that a police officer's constitutional rights have been violated either by an order to take a polygraph test, the test itself, or his dismissal for refusing the test.1/

1/In addition to Illinois, the courts in New Jersey, Pennsylvania, Connecticut, Nevada and Florida have ruled that it is improper to dismiss a police officer for failure to comply with an order to undergo a polygraph test under various circumstances. Stape v. Civil Service Com., 404 Pa. 354, 172 A.2d 161 (1961), which was subsequently displaced by legislation, 18 Nos.Pa.Stat. §7321 (1973), which exempted law enforcement agencies and drug dispensers from the statute's restriction on polygraph tests in the employment field. Molino v. Board of Public Safety, 154 Conn. 368, 225 A.2d 805 (1966). Engel v. Woodbridge, 124 N.J.Super. 307, 306 A.2d 485 (1973); Burrough of Elmwood Park v. Fallon, 128 N.J.Super. 51, 319 A.2d 72 (1974); and Gandy v. State, 607 P.2d 581 (Nev. 1980); Farmer v. City of Fort Lauderdale, ___So.2d_____, 198__. None of these cases found a violation of the police officer's constitutional rights.

On the other hand, the courts in Arizona, California, Louisiana, Missouri, New York and Washington have upheld the police chief's prerogative to order an officer to undergo polygraph tests under the sanction of dismissal for refusal to do so. Eshelman v. Blubauam, 114 Ariz. 376, 560 P.2d 1283 (App. 1977); McCain v. Sheridan, 160 Cal.App.2d 174, 324 P.2d 923 (1st Dist. 1958); Frazee v. Civil Service Board, 170 Cal.App.2d 333 P.2d 943 (1st Dist. 1959);

The question of whether it is constitutionally permissable to dismiss a police officer from his employment for refusing to submit to a polygraph examination in connection with an ongoing criminal investigation is pending before this court in the form of a petition for a Writ of Certiorari to the Supreme Court of Florida in City of Fort Lauderdale, Florida, No. 82-1814.

The petitioner in that case has pointed out the need to resolve the conflict between state courts of last resort in

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1/, cont., Fichera v. State Personnel Board, 217 Cal.App.2d 613, 32 Ca.Reptr. 159 (1st Dist. 1963); Roux v. New Orleans Police Dept., 223 So.2d 905 (La.App. 1969), cert.den. 254 La. 815, 227 So.2d 148, cert.den. 397 U.S. 1008; Clayton v. New Orleans Police Dept., 236 So.2d 548 (La.App. 1970), cert.den. 256 La. 867, 239 So.2d 363; Dieck v. Department of Police, 266 So.2d 500 (La.App. 1972); Creadeur v. Department of Public Safety, Div. of State Police, 364 So.2d 155 (La.App. 1978); Sorbello v. Maplewood, 610 S.W.2d 375 (Mo.App. 1980); Dolan v. Kelly, 76 Misc.2d 151, 348 N.Y.S.2d 478 (1973); Seattle Police Officers' Guild v. Seattle, 80 Wash.2d 307, 494 P.2d 485 (1972).

decisions regarding the federal question of whether discharging a police officer for refusing to take a polygraph examination violates the officer's rights under the 5th and 14th Amendments.

II.

WHETHER THE SUPREME COURT OF ILLINOIS VIOLATED THE DOCTRINE OF SEPARATION OF POWERS IN ADOPTING A RULE BANNING THE EXECUTIVE BRANCH FROM DISCIPLINING POLICE OFFICERS WHO DISOBEY AN ORDER FROM A SUPERIOR TO UNDERGO A POLYGRAPH TEST IN THE ABSENCE OF A STATUTE PROHIBITING SUCH DISCIPLINARY ACTION, OR EVIDENCE AND A FINDING THAT SUCH DISCIPLINARY ACTIONS ARE A VIOLATION OF THE POLICE OFFICERS' FIFTH AMENDMENT OR OTHER CONSTITUTIONAL RIGHTS

In our system of government, the courts may not and do not interfere with the internal administration of the executive branch of government, in the absence of a

violation of constitutional rights or failure to comply with statutory requirements.2/ Early in our nation's history, Chief Justice Taney, in Decatur v. Paulding, 14 Pet. 497, 516, 10 L.Ed. 559, stated:

> "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief and we are quite satisfied that such a power was never intended to be given them."

Also, in United States v. Stewart, 234 F.Supp. 94, 96-98, Affd. 339 F.2d 753 (Dist. of Col. Cir. 1964), the court

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2/The doctrine of separation of powers is not clearly stated in the federal Constitution, but has been deemed to flow naturally from the division of the federal government into three branches, each given enumerated powers. It is clearly a concept which operates as a constitutional limitation as between the branches of the federal government. See Kilbourn v. Thompson, 103 U.S. 168, 190, 26 L.Ed. 372; Springer v. Government of Philippine Islands, 277 U.S. 189, 201, 48 S.Ct. 480, 72 L.Ed. 845.

On the other hand, the Illinois Constitution specifically provides that "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill.Cont. Art. II Sec. 1.

carefully analyzed the scope of its authority, and stated:

> "At the outset it is necessary to consider the scope of the authority of this court to review executive action, such as was taken in this instance. There seems to be a growing tendency to resort to the courts for relief from governmental acts claimed to be harsh, unjust, inexpedient or undesirable. Such efforts ignore some basic fundamental principles that are well known but often overlooked in the turmoil of activities of every-day life. Simple and elementary as they are, it appears desirable to recall and analyze them from time to time."

* * *

> "In the United States supreme power is not vested in the judiciary. The courts are not superior to either of the other two branches of Government and have no power of supervision or control over them . . . As it is, the courts may not step in and stay or control executive action unless the executive or administrative officer acts in excess of his statutory authority, or in a manner repugnant to a provision of the Constitution of the United States."

* * *

> "The Supreme Court crystallized the application of these principles in connection with the authority of the Courts vis-a-vis the executive officers

> of the Government in Larson v. Domestic & Foreign Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 . . . The Supreme Court held that the courts may not step in and either stay or compel executive action unless the executive official was acting in excess of his statutory authority or transgressed a constitutional limitation. The mere fact that he might be acting erroneously or perhaps even tortiously does not vest the courts with jurisdiction to interfere." (Emphasis added)

The Illinois Appellate Court has also recognized the scope of its authority under the doctrine of separation of powers. In Buege v. Lee, 56 Ill.App.3d 793, 372 N.E.2d 427 (2nd Dist. 1978), the court stated:

> "It is axiomatic, of course, that the chief of police has the duty to protect the public from the evil effects of crime and corruption. Inherent in that duty is the responsibility to maintain an efficient, effective and honest police force which deals fairly with citizens. A police chief is certainly justified in maintaining necessary discipline in his department, in seeking to purge the force of members who may have engaged in criminal or disreputable acts or to otherwise determine whether his subordinates are able to perform their required duties. Clearly, the actions of a police chief in implementing these responsibilities

> should not, except in the most extraordinary circumstances, be subject to a continuing review or supervision by the courts. This has been uniformly recognized by the authorities in Illinois and elsewhere. See, e.g., Charles v. Wilson, 52 Ill.App.2d 14, 25, 26, 201 N.E.2d 627 (1964); Coursey v. Board of Fire & Police Com'rs of Skokie, 90 Ill.App.2d 31, 43, 234 N.E.2d 339 (1967); Conte v. Horcher, 50 Ill.App.3d 151, 154, 8 Ill.Dec. 329, 365 N.E.2d 567 (1977); See also, Seattle Police Officers' Guild v. City of Seattle, 80 Wash.2d 307, 494 P.2d 485, 490 (1972)." Buege v. Lee, 56 Ill.App.3d 793, 372 N.E.2d 427, 14 Ill.Dec. 416 at 420 (2nd Dist. 1978).

The courts have maintained a hands-off approach to the review of decisions by prison administrators unless necessary to protect the inmates from unconstitutional actions carried out under color of state law.3/ "It is a rule grounded in necessity and common sense, as well as

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3/See, e.g., Knuckles v. Prasse, 302 F.Supp. 1036 (E.D.Penn. 1969); Washington v. Lee, 263 F.Supp. 327, 331 (M.D.Ala., aff'd. per curiam, sub nom Lee v. Washington, 389 U.S. 967, 88 S.Ct. 457, 19 L.Ed.2d 457 (1967); and Coffin v. Reichard, 143 F.2d 443, 445, 155 A.L.R. 143 (6th Cir. 1945) cert. denied, 325 U.S. 887, 65 S.Ct. 1568, 89 L.Ed. 2001 (1945).

authority, that the maintenance of discipline in prison is an executive function with which the federal branch ordinarily will not interfere." Sewell v. Pegelow, 291 F.2d 196, 197 (4th Cir. 1961).

In a similar vein, on March 11, 1983, President Ronald Reagan ordered that all federal employees who have access to classified information may be required to undergo polygraph tests when appropriate in the course of investigations of unauthorized disclosures of such information. The President's order provides that departmental regulations shall permit an agency to decide what appropriate adverse consequences (including dismissal) will follow from an employee's refusal to cooperate with a polygraph test.4/

4/National Security Decision, Directive No. 84; Steven Garfinkel, director of the Information Security Oversight Office, was quoted in the press as estimating that 60 government agencies and hundreds of thousands of government employees have access to classified information.

If President Reagan's March 11, 1983 order is challenged, the federal courts will no doubt follow the admonition of Chief Justice Stone, who, when an Associate Justice, eloquently discussed the doctrine of separation of powers in his dissenting opinion in United States v. Butler, 297 U.S. 1, 78, 87, 56 S.Ct. 312, 325, 328, 8 L.Ed. 477 (1936):5/

> ". . . While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."
>
> * * *
>
> "Courts are not the only agency of government that must be assumed to have capacity to govern."

5/While these statements are in a dissenting opinion, there appears to have been no difference of views as to these basic principles, the disagreement between the majority and minority being only in their specific application.

III.

WHETHER A POLICE OFFICER HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN HIS CONTINUED EMPLOYMENT, AND IF SO, DOES THIS INTEREST OUTWEIGH THE PUBLIC INTEREST IN MAINTAINING THE INTEGRITY OF PUBLIC EMPLOYEES SO AS TO PROHIBIT A POLICE CHIEF FROM REQUIRING A POLICE OFFICER TO UNDERGO A POLYGRAPH TEST REGARDING ALLEGED MISCONDUCT

The Illinois Supreme Court has failed to balance any property interest of the respondents may have in their employment against the public's interest in maintaining an effective and honest police force. This court in Uniformed Sanitation Men's Assoc. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280, 88 S.Ct. 1917 (1968), recognized that a public employee cannot be compelled to give up his constitutional privilege against self-incrimination upon penalty of the loss of employment. However, this court did not relate that holding to a specific constitutionally protected right of employ-

ment; rather this court in Uniformed Sanitation Men held that public employees, like all other persons, were entitled to the benefit of the Constitution.

In Roux v. New Orleans Police Dept., supra (see footnote 1 herein), the court stated that an officer has no unalienable right to employment as a police officer, while the paramount right of the people to protection far transcends any right an officer has to employment as such.

The cases cited herein in the second paragraph of footnote 1 all recognize a police chief's inherent authority to order officers to undergo a polygraph examination as a part of his duty to operate an effective police force. Justice Moran in his dissenting opinion in this case (see Appendix A-25) noted this. Justice Moran also stated:

> "As an investigatory tool, police chiefs utilize polygraph examinations to narrow the focus of inquiry and, fre-

quently, to exonerate the accused officer. The majority's decision will serve only to impede and lengthen these investigations while at the same time allowing individuals to perform their duties in the face of other officers' and the public's distrust. No one can possibly benefit when the public loses respect for those individuals sworn to uphold the law. Further, both criminal suspects and complainants are frequently requested to take polygraph tests as an aid in investigations. It is incongruous that officers may refuse to submit to the very examinations which they expect other citizens to undergo.

"It also seems to me that today's opinion disregards the fact that police officers are not simply ordinary citizens. Rather, they are members of a "paramilitary [institution] in which systematic authority and discipline are required to ensure orderly and effective law enforcement." (e.g., Piotrowski v. State Police Merit Board (1980), 85 Ill.App.3d 369, 376; cf. Gardner v. Broderick (1968), 392 U.S. 273, 20 L.Ed. 2d 1082, 88 S.Ct. 1913 (police officers, as trustees of the public interest, can be dismissed for failing to answer questions relating to official duties) (dicta).) I consider it anomalous that, although officers have a sworn duty to cooperate in the investigation of crime, they now have the unfettered right to obstruct those investigations." See Appendix A-26 to A-28 herein.

The courts have also recognized the need to balance the public interest in execu-

tive officials having the inherent authority to maintain order and discipline among those persons under their charge, such as prison administrators.

"The power of promulgating regulations necessary for the safety of the prison population and the public as well as for the maintenance and proper functioning of the institution, is vested in correctional officials with expertise in the field and not in the courts. There must be granted wide discretion in the exercise of such authority." Long v. Parker, 390 F.2d 816, 820 (3rd Cir. 1968).

Likewise, the courts have consistently ruled that schools have inherent authority to maintain order and to discipline students and have latitude and discretion in their formulation of

rules and regulations and general standards of conduct.6/

In Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (8th Cir. 1969), the court affirmed the dismissal of a suit brought by state college students who had been suspended after a hearing in which they had been found guilty of participating in a mass rally that engaged in potentially disruptive conduct, aggressive action, disorder and disturbance, acts of violance and destructive interference with the rights of others. The court stated:

> "Let there be no misunderstanding as to our precise holding. We do not hold That any college regulation, however loosely framed, is necessarily valid.

6/Jones v. State Bd. of Educ., 279 F.Supp. 190, 202 (M.D. Tenn. 1968), aff'd 407 F.2d 834 (6th Cir. 1969); Buttny v. Smiley, 281 F.Supp. 280 285, 286 (D. Colo. 1968); Barker v. Hardway, 399 F.2d 638 (4th Cir. 1968) cert. denied 394 U.S. 905, 89 S.Ct. 1009, 22 L.Ed.2d 217; and Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 618 (M.D. Ala. 1967).

> We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent right to promulgate rules and regulations; that it has the inherent power to discipline; that it has the power to protect itself and its property . . . that school regulations are not to be measured by the standards which prevail for the criminal law and criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement."

Maintaining discipline in a police department is no less important than the need to maintain discipline in prisons or universities. Police officers are entrusted with a grave responsibility. Our personal safety and the safety of our property is in their hands. Police officers are authorized by law to carry and, when necessary, use weapons. The proper administration of a police force requires appropriate discipline. Police officers must cooperate with internal investigations of police brutality, bribery, theft and other serious mis-

conduct. As public employees holding positions of public trust, police officers are subject to a high degree of scrutiny involving their performance of their official duties. Their superiors should be allowed to conduct internal disciplinary investigations and make the appropriate orders thereto without inference by the courts in matters not of a constitutional magnitude.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari should be issued from this Court to review the decision of the Supreme Court of Illinois.

Respectfully submitted,

CHARLES E. BOX, Legal Director*
KATHLEEN ELLIOTT, City Attorney
CITY OF ROCKFORD DEPARTMENT OF LAW
425 E. State St., Suite 504
Rockford, IL 61104
(815) 987-5549

Counsel for Petitioner

*Counsel of Record

Date: July 7, 1983

APPENDIX

APPENDIX A
A-1

OPINION
SUPREME COURT
OF ILINOIS

United States of America

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the Tenth day of January in the year of our Lord, one thousand nine hundred and Eighty-three, within and for the State of Illinois.

Present: Howard C. Ryan, Chief Justice

Justice Robert C. Underwood

Justice Joseph H. Goldenhersh

Justice Thomas J. Moran

Justice Daniel P. Ward

Justice William G. Clark

Justice Seymour Simon

Neil F. Hartigan, Attorney General

Louie F. Dean, Marshal

Attest: Juleann Hornyak, Clerk

Be it Remembered, that afterwards, to-wit, on the 24th day of January, 1983, the

opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

John Kaske and Paul A. Triolo, et al.,

Appellants,

No. 55501
55599
Cons.

vs.

City of Rockford, etc., et al.,

Appellees.

Appeal from
Appellate Court
Second District

JUSTICE CLARK delivered the opinion of the court:

This case is a consolidation of two different appeals concerning the giving of polygraph examinations to public law-enforcement officials and the admissibility of the polygraph results in administrative disciplinary proceedings. In cause No. 55501, the plaintiffs, Rockford police officers

John Kaske and Paul A. Triolo, brought suit against the city of Rockford and its police chief seeking to prohibit the defendants from compelling the plaintiffs to undergo polygraph examinations. In cause No. 55599, the plaintiff, Itasca police officer Robert Collura, is challenging a decision of the Itasca board of fire and police commissioners ordering his discharge following a hearing in which the results of a polygraph examination were admitted into evidence. We discuss the latter case first.

Collura v. Board of Fire and Police Commissioners of the Village of Itasca

On January 26, 1980, the chief of police of the village of Itasca, Stanley J. Rosol, filed charges before the Itasca board of fire and police commissioners against Itasca police officer Robert Collura. It was alleged that Officer Collura had on December 27, 1979, while on duty, made

improper physical contact with Alicia Martinez. Officer Collura was also charged with making an untruthful report about what happened between him and Alicia Martinez. Alicia Martinez had made a statement to the chief of police that Officer Collura had sexually touched her while she was being detained on December 27 at the scene of a reported burglary.

Prior to the filing of charges by the chief of police, the plaintiff had been ordered to submit to a polygraph examination or face disciplinary action. Plaintiff appeared for the polygraph examination on January 8, 1980, and asserts that the polygraph examiner prejudged the plaintiff's veracity before the test was administered. The plaintiff also testified that the examiner was abusive and argumentative, which caused the plaintiff to become angry and hostile.

At the hearing before the Itasca board of fire and police commissioners the polygraph examiner was called as an expert witness and the results of the polygraph examination were admitted into evidence. The polygraph examiner testified that the plaintiff lied in answering questions concerning his alleged improper contact with Alicia Martinez. The operator indicated that he had four years of experience conducting examinations, and denied that he had prejudged Collura or had acted in a hostile or argumentative way toward the plaintiff. Counsel for the plaintiff attacked the competency of the examiner and objected to the admissibility of the examiner's testimony and the results of the polygraph test.

The board found Collura guilty of the charges and determined that his conduct warranted a discharge. Officer Collura filed for administrative review of the

board's order pursuant to the Administrative Review Act (Ill. Rev. Stat. 1979, ch. 110, par. 264 et seq.). The circuit court of Du Page County affirmed the decision of the board of fire and police commissioners, and the appellate court, under Supreme Court Rule 23 (73 Ill.2d R. 23), found no error in the admission of polygraph results which were founded upon the testimony of a properly qualified and certified examiner. 97 Ill.App.3d 1199.

Kaske v. City of Rockford

On February 2, 1981, the plaintiffs filed a complaint for declaratory judgment with the circuit court of Winnebago County, asking that the defendants, the city of Rockford and Delbert Peterson, the chief of police of the Rockford police department, be restrained and enjoined from ordering the plaintiffs to undergo polygraph examinations. A temporary restraining order was granted

and then extended on four occasions by the agreement of the parties. The plaintiffs also filed a motion for a preliminary injunction on February 3, 1981. The defendants filed a motion to dismiss which the circuit court granted with leave to amend.

An amended complaint was filed with the court on March 13, 1981, and an amendment to that complaint was allowed to be filed on March 20, 1981. The defendants filed a motion to dismiss on March 30, 1981.

On April 16, 1981, the circuit court entered an order dismissing the amended complaint, finding that it was insufficient to state a cause of action for declaratory judgment. The court denied the motion for a preliminary injunction, dissolved the temporary restraining order, and granted the plaintiffs' leave to file a further amended complaint if "they chose to do so". The plaintiffs elected to stand on their

notice of appeal the same day.

On August 12, 1981, the appellate court, in a Rule 23 order (73 Ill.2d R. 23), affirmed the trial court's denial of the preliminary injunction and dismissed the appeal. (98 Ill.App.3d 1203.) We granted plaintiffs leave to appeal (73 Ill.2d R. 315).

Plaintiffs Kaske and Triolo are close personal friends. In December of 1980 plaintiff Triolo brought an action for dissolution of marriage. When his wife was informed, she told Triolo that she would "take his job." Shortly thereafter, plaintiff Triolo's wife contacted supervisory officers of the Rockford police department and arranged a meeting with the plaintiffs' immediate supervisory lieutenants. At the meeting Mrs. Triolo made oral statements that the plaintiffs had smoked marijuana on different social occasions. A week later Mrs. Triolo con-

tacted one of the lieutenants with whom she had met and recanted her previous allegations, indicating that what she had said was not true.

The chief of police ordered both plaintiffs to submit written reports concerning the allegations. The plaintiffs did submit reports in which each denied the use of any drugs.

The plaintiffs were then ordered to undergo polygraph examinations. They were informed that any information obtained as a result of the examinations might be used against either or both of the plaintiffs (in bringing charges) before the board of fire and police commissioners of Rockford. The plaintiffs were told by the chief of police that their refusal to obey the order would subject them to charges before the board of fire and police commissioners of Rockford.

Prior to the order of the chief of

police that plaintiffs prepare reports concerning the allegations of drug use, Officer Kaske had submitted a letter of resignation to the police department and soon thereafter asked the chief of police to accept a withdrawal of the resignation. Kaske was informed that he had to appear before the board of fire and police commissioners of the city of Rockford to request withdrawal of his resignation. At the January 6, 1981, meeting of the board, the chief of police informed the board that Kaske was under investigation for alleged drug use. The board allowed Kaske to withdraw his letter of resignation.

The defendants suggest that because Officers Kaske and Triolo did not exhaust administrative review procedures that this court should not review the case since the plaintiffs fail to state a cause of action for declaratory judgment. While

our judiciary does not function as an original forum for immediate review of the propriety of all of a chief's orders to his subordinates in that department, the exhaustion of the administrative review process is not the exclusive remedy in the instant case. (See also People ex rel. Fahner v. American Telephone & Telegraph Co. (1981), 86 Ill.2d 479, 485.) A declaratory judgment is not barred because other relief can be obtained. It is rather an optional, altnerative remedy. Kupsik v. City of Chicago (1962), 25 Ill.2d 595, 598.

The appellate court in Buege v. Lee (1978), 56 Ill.App.3d 793, correctly recognized that a plaintiff is not required to "provoke a disciplinary proceeding against himself so as to provide a forum to challenge the chief's order. It is central to the purpose of the declaratory judgment procedure that it allow 'the court to take hold of a controversy one step sooner

than normally--that is, after the dispute has arisen, but before steps are taken which give rise to claims for damages or other relief. The parties to the dispute can then learn the consequences of their action before acting'. (Ill. Ann. Stat., ch. 110, par. 57.1, Historical and Practice Notes, at 132 (Smith-Hurd (1968).)" 56 Ill. App.3d 793, 798.

Section 57.1 of our Civil Practice Act permits declaratory judgments to be rendered in instances when an "actual controversy" exists. (Ill. Rev. Stat. 1979, ch. 110, par. 57.1) An actual controversy means that the case presents "'a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the determination of the controversy or some part thereof. [Citations.]'" Miller v. County of Lake (1980), 79 Ill.2d 481, 487, quoting Underground Contractors

Association v. City of Chicago (1977), 66 Ill.2d 371, 375; accord Howlett v. Scott (1977), 69 Ill.2d 135, 141-142.

The requirement of an "actual controversy" was intended to distinguish justiciable issues from hypothetical disputes. (A.S. & W. Club v. Drobnick (1962), 26 Ill.2d 521, 524.) We find that the dispute between the plaintiffs and the chief of police over submitting to the examination and the consequences of taking it or those resulting from a refusal to take the test establish an actual controversy here.

We next address the issue of whether the results of the polygraph examination are admissible at an administrative hearing before the board of fire and police commissioners.

Decisions of our appellate court have been divided on the admission of polygraph evidence. In Washington v. Civil Service Com. (1981), 98 Ill.App.3d 49, the

appellate court concluded that the results are admissible at an administrative hearing provided that the examiners are present, their qualifications are established, and they are subject to cross-examination.

The court in Washington relied upon decisions in Chambliss v. Board of Fire & Police Commissioners (1974), 20 Ill.App. 3d 24, 31-32, and Coursey v. Board of Fire & Police Commissioners (1967), 90 Ill.App.2d 31, appeal denied (1968), 38 Ill.2d 627, for the proposition that because an unhindered inquiry into subordinates actions is absolutely necessary where a police chief is attempting to run an effective department, the results of a polygraph test that an officer is compelled to undergo are admissible at an administrative hearing where the board of fire and police commissioners is investigating the conduct of the police officer.

The reasoning of the appellate court in

Washington incorporated the rationale of Chambliss and Coursey that the police chief should not be deprived of a useful investigative tool where the examination is administered and the results interpreted by a qualified examiner. The findings of the appellate court in McGowen v. City of Bloomington (1981), 99 Ill.App. 3d 986, and Sommer v. Goetz (1981), 102 Ill. App.3d 117, contradict the holding in Washington.

In McGowen the court found that the admission of polygraph results materially affected the decision of the board of fire and police commissioners, recognizing that "the polygraph has attained a stature and an acceptance in the public mind far in advance of that achieved in the world of jurisprudence," and that it remains "incompetent evidence". (99 Ill.App.3d 986, 990, 991, citing People v. Monigan (1979), 72 Ill.App.3d 87.) The court concluded

that the admission of such evidence amounted to error as an abrogation of a fundamental rule of evidence. 99 Ill.App. 3d 986, 991.

In Sommer v. Goetze (1981), 102 Ill.App. 3d 117, the appellate court determined that the sheriff's merit commission of Taxewell County erred in admitting polygraph results as substantive evidence against a deputy sheriff where the potential jeopardy was the loss of employment.

We now find that in view of our holdings in People v. Baynes (1981), 88 Ill.2d 225, and People v. Szabo (Jan. 24, 1983), No. 52626, slip op. at 24-25, that the results of a polygraph examination are not admissible before the board of fire and police commissioners. It is unnecessary to reiterate the exhaustive review of polygraph evidence we undertook in People v. Baynes. It is enough to say that in

holding that admission of stipulated-to polygraph evidence at a criminal trial constituted error, we recognized that the process of accurately recording the instrument's results and then correctly interpreting those results "has not reached a level of sophistication that makes it generally more probative than prejudicial." (People v. Baynes (1981), 88 Ill.2d 225, 239.) We found in Baynes that the stipulation of the parties did not make evidence otherwise considered not reliable enough admissible because it was agreed to. 88 Ill.2d 225, 240.

In People v. Szabo this court held that the trial court acted properly in excluding the results of polygraph examinations at a death sentencing hearing, where the rules governing the admission of evidence are not applicable (Ill. Rev. Stat. 1979, ch. 38, par. 9-1(e)). In Szabo we again pointed to the doubts about the polygraph's

reliability and the risk that a jury would find results of the examination to be conclusive.

We agree with the words of the appellate court in Sommer v. Goetze (1981), 102 Ill. App.3d 117, 121, that while the rules of evidence are not as rigidly applied at an administrative hearing, such a relaxation of rules "cannot abrogate the right to a just, fair and impartial hearing". Without the benefit of this court's opinion in Baynes the appellate court in Sommer correctly saw that if a petty criminal "whose potential jeopardy does not exceed a few hundred dollars" cannot have polygraph results admitted at his trial, then evidence admitted against a deputy sheriff facing a "loss of merit employment" should be no less reliable. 102 Ill.App.3d 117, 121.

Our opinion in Baynes highlighting, the inherent deficiencies of the polygraph

examination supports our holding today that the results of the examination are not admissible at an administrative hearing before the board of fire and police commissioners.

The plaintiffs face the potential of the loss of their livelihood. There is a real danger that the board of fire and police commissioners will find the results of the polygraph examination completely determinative of guilt or innocence. We feel that the Sommer case articulates the correct rule that polygraph evidence is not reliable enough to be used as substantive evidence in an administrative proceeding before the board. The findings before a board of fire and police commissioners must be based upon facts proved by competent evidence. Fantozzi v. Board of Fire & Police Commissioners (1962), 35 Ill.App.2d 248, 257, aff'd (1963), 27 Ill. 2d 357.

Admission of polygraph evidence at a hearing before the board of fire and police commissioners would also compromise our role in undertaking any review of an agency's decision under the Administrative Review Act (Ill. Rev. Stat. 1979, ch. 110, par. 264 et seq.), in those cases where polygraph evidence had been considered in the board's decision-making process.

We next address whether the refusal of a police officer to take a polygraph examination can be grounds for disciplinary action against the officer. Our appellate court on four different occasions has held that refusal was cause for disciplinary action. Myers v. Cook County Police & Corrections Merit Board (1978), 67 Ill.App.3d 223; Piotrowski v. State Police Merit Board (1980), 85 Ill.App.3d 369; Williams v. Police Board (1972), 8 Ill.App.3d 345; Coursey v. Board of Fire & Police

Commissioners (1976), 90 Ill.App.2d 31.

We are mindful of the need for public employers to maintain personal integrity in the eyes of those they serve; we also understand that a police chief has to have the authority to require officers to answer questions specifically related to the performance of the officer's offical duties in cooperation with the investigation into an officer's official conduct. And while we recognize that a polygraph examination is an instrument of some investigatory utility and value, we nevertheless conclude in view of our disposition as to the inadmissibility of polygraph results at the officer's administrative hearing that a municipal police officer can refuse to submit to a polygraph examination and such a refusal cannot be used as the basis for filing of charges seeking disciplinary action against the officer.

We do not lighly rule that an internal order of a municipal police department is improper. We are not attempting in finding in favor of the plaintiffs to, as the appellate court in Coursey v. Board of Fire & Police Commissioners (1967), 90 Ill.App.2d 31, 43, described it, "vitiate the systematic authority and discipline upon which proper enforcement of the law is dependent". (90 Ill.App.2d 31, 43.) It would be inconsistent for us to find that the polygraph results are not admissible in front of the board of fire and police commissioners because the examination is not reliable enough, and then hold an officer's refusal to submit to such a test could be grounds for a disciplinary action being brought by the police chief.

In DeVito v. Civil Service Com. (1961), 404 Pa. 354; 172 A2d 161, the Supreme Court of Pennsylvania held that refusal of Philadelphia police officers to take

the polygraph examination did not establish "just cause" to warrant the officers' dismissal. The court took cognizance of the questionable accuracy of the test, recognized that the examination was not judicially acceptable in Pennsylvania, and found that the willingness or the unwillingness of an officer to submit to the test is inadmissible before the Civil Service Commission (404 Pa. 354, 360, 172 A.2d 161, 164.) See also Burrough of Elmwood Park v. Fallon (1974), 128 N.J. Super. 51, 319 A.2d 72, where the court said that a police officer is entitled to refuse to take a polygraph examination and that refusal cannot be used against him as a basis for a disciplinary action. 128 N.J. Super. 51, 57, 319 A.2d 72, 76.

In conclusion we hold that the chief of police of the Rockford police department cannot compel Officers Kaske and Triolo to submit to polygraph examinations. We

find that the officers refusal cannot be used as a basis for disciplinary charges to be brought against them. The judgment of the appellate court affirming the dismissal by the circuit court of Winnebago County is reversed, as is the judgment of the circuit court.

We also hold that the decision to discharge Officer Robert Collura by the board of fire and police commissioners of the village of Itasca cannot stand. The appellate court's order affirming the circuit court's order affirming the decision of the Board is reversed, as is the judgment of the circuit court. We remand Officer Collura's cause to the board of fire and police commissioners' of the village of Itasca for a new hearing, in which any results of the police officer's polygraph examination, any opinions offered by the polygraph examiner, or any refer-

ences to the polygraph examination are inadmissible as evidence.

55501 - Judgments reversed.
55599 - Judgments reversed; cause remanded, with directions.

JUSTICE MORAN, concurring in part and dissenting in part:

I disagree with that portion of the majority opinion which holds that police officers cannot be compelled to submit to a polygraph examination. The majority reasons that "[i]t would be inconsistent for us to find that the polygraph results are not admissible in front of the board of fire and police commissioners***and then hold an officer's refusal to submit to such a test could be grounds for a disciplinary action." (Slip op. at 8.) For a number of reasons I consider unfounded the concern over this supposed inconsistency.

Polygraph evidence is disallowed during an administrative hearing or court pro-

ceeding because the reliability of the examination results has not been sufficiently established. Consequently, it would be improper to subject an individual to the substantial risk that the fact finder would consider this evidence conclusive on the issue of his or her guilt or innocence. (People v. Baynes (1981), 88 Ill. 2d 225.) However, there is a distinction between the use of polygraph examinations as evidence upon which the outcome of a proceeding may depend and their use as an investigatory tool. "Such tests are recognized as having some value in investigation, even though they are not yet sufficiently reliable to be admitted in evidence." McCain v. Sheridan (1958), 160 Cal.App.2d 174, 177, 324 P.2d 923, 926; see, e.g., Seattle Police Officers' Guild v. City of Seattle (1972), 80 Wash. 2d 307, 494 P.2d 485 (en banc).

As an investigatory tool, police chiefs

utilize polygraph examinations to narrow the focus of inquiry and, frequently, to exonerate the accused officer. The majority's decision will serve only to impede and lengthen these investigations while at the same time allowing individuals to perform their duties in the face of other officers' and the public's distrust. No one can possibly benefit when the public loses respect for those individuals sworn to uphold the law. Further, both criminal suspects and complainants are frequently requested to take polygraph tests as an aid in investigations. It is incongruous that officers may refuse to submit to the very examinations which they expect other citizens to undergo.

It also seems to me that today's opinion disregards the fact that police officers are not simply ordinary citizens. Rather, they are members of a "paramilitary [institution] in which systematic authority

and discipline are required to ensure orderly and effective law enforcment." (E.g., Piotrowski v. State Police Merit Board (1980), 85 Ill.App.3d 369, 376; cf. Gardner v. Broderick (1968), 392 U.S. 273, 20 L. Ed.2d 1082, 88 S.Ct. 1913 (police officers, as trustees of the public interest, can be dismissed for failing to answer questions relating to official duties) (dicta).) I consider it anomalous that, although officers have a sworn duty to cooperate in the investigation of crime, they now have the unfettered right to obstruct those investigations.

The majority relies upon two decisions for the proposition that police officers may not be required to submit to a polygraph examination. (Burrough of Elmwood Park v. Fallon (1974), 128 N.J. Super. 51, 319 A.2d 72; Stape v. Civil Service Com. (1961), 404 Pa. 354, 172 A.2d 161.) Of these, Stape was essentially "overruled"

by subsequent legislation. (See 18 Pa. Cons. Stat. Ann. sec. 7321 (Purdon 1973) (law enforcement agencies are exempted from the statutory ban on the administration of polygraph examinations).) On the other hand, numerous cases have recognized a police chief's inherent authority to compel submission to polygraph tests in an effort to maintain an efficient and honest police force. (E.g., Seattle Police Officers' Guild v. City of Seattle (1972), 80 Wash.2d 307, 494 P.2d 485 (en banc); Sorbello v. City of Maplewood (Mo.App. 1980), 610 S.W.2d 375; Eshelman v. Blubaum (1977), 114 Ariz. 376, 560 P.2d 1283; Roux v. New Orleans Police Department (La.App. 1969), 223 So.2d 905, cert. denied (1970), 397 U.S. 1008, 25 L. Ed.2d 421, 90 S. Ct. 1236; McCain v. Sheridan (1958), 160 Cal.App.2d 174, 324 P.2d 923.) Our appellate court has also held that officers may be disciplined for failure to submit to the

examination. Piotrowski v. State Police Merit Board (1980), 85 Ill.App.3d 369; Myers v. Cook County Police & Corrections Merit Board (1978), 67 Ill.App.3d 223; Buege v. Lee (1978), 56 Ill.App.3d 793; Williams v. Police Board (1972), 8 Ill.App.3d 345; Coursey v. Board of Fire & Police Commissioners (1967), 90 Ill.App.2d 31.

For the reasons stated herein, I believe the aforementioned cases represent the better view, and would accordingly affirm the judgment of the appellate court in cause No. 55501. However, I do concur with the majority in cause No. 55599.

JUSTICE UNDERWOOD joins in this partial concurrence and partial dissent.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 8, 1983

Mr. Charles Box
Attorney at Law
425 E. State St.
Rockford, IL 61104

Nos. 55501 - John Kaske, et al., appel-
55599 lates, vs. City of Rockford,
Cons. a municipal corporation, et
al., etc., et al., appel-
lees. Appeal, Appellate
Court, Second District.

Ths Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Very truly yours,
/s/ Juleann Hornyak
Clerk of the Supreme
Court

APPENDIX C

C-1

SECOND DISTRICT
Filed August 12, 1981

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

JOHN KASKE and PAUL A. TRIOLO,

Plaintiffs-Appellants,

81-278 v.

CITY OF ROCKFORD, a municipal corporation, and DELBERT PETERSON, individually and as Chief of Police, Rockford Police Department,

Defendants-Appellees.

Appeal from the Circuit
of Winnebago County.
The Honorable Harris H. Agnew,
Judge Presiding.

ORDER DISPOSING OF APPEAL

PURSUANT TO SUPREME COURT RULE 23

This is an action for declaratory judgment brought on February 2, 1981, by two patrol officers for the City of Rockford Police Department. The complaint re-

quested the court to (1) declare the rights of the parties regarding an order by defendant city's Chief of Police that the plaintiffs undergo a polygraph examination and (2) restrain and enjoin the defendants from ordering the plaintiffs to undergo such an examination or disciplinary action resulting from the subject matter set forth in the complaint. A temporary restraining order was granted on the day the complaint was filed and extended four times by agreement of the parties. On February 3, 1981, plaintiffs filed a motion for a preliminary injunction. After the defendants' first motion to dismiss was granted with leave to amend, plaintiffs filed an amended complaint, which they supplemented by a later amendment adding a second count.

On March 30, 1981, defendants filed a second motion to dismiss. On April 16, 1981, the trial court denied the plain-

tiffs' motion for issuance of a preliminary injunction, dissolved the temporary restraining order and dismissed the complaint. In its order that day, the court granted the plaintiffs twenty-one days to file an amended complaint. The plaintiffs filed their notice of appeal the same day.

Before we may reach the merits of the issues raised on appeal, we must sua sponte consider whether this is a final and appealable order. Where there is no final and appealable order the reviewing court must dismiss the appeal on its own motion even though, as here, the question has not been raised by the parties. (In re Estate of Tingos (1979), 72 Ill. App.3d 703, 708-09.) The order appealed from in the instant case granted the plaintiffs twenty-one days to amend the complaint, and the appeal was filed the same day. At the time the appeal was

filed, the trial court had not entered any final order. Appellate Courts, subject to statutory exceptions, are without jurisdiction to review judgments, orders or decrees which are not final. (Curtis v. Albion-Brown's Post 590 Am. Legion (1965), 65 Ill.App.2d 473, 477.) If the plaintiffs desired to stand by their complaint after the dismissal, they should have so indicated to the trial court so that words indicating the finalty of judgment could have been entered for the defendants. Robinson v. City of Geneseo (1966), 77 Ill.App.2d 308, 310.

One issue in plaintiffs' appeal is the propriety of the trial court order denying the preliminary injunction and dissolving the temporary restraining order previously entered. Under Supreme Court Rule 307(a)(1)(Ill.Rev.Stat. 1979, ch. 110A, par. 307(a)(1)), an appeal may be taken as a matter of right from an interlocutory

trial court order granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction. We have considered this issue as an interlocutory appeal, and we find that the decision of the trial court denying the preliminary injunction must be upheld.

The requirements for the issuance of a preliminary injunction are set out in McCormick v. Empire Accounts Service, Inc. (1977), 49 Ill.App.3d 415, 417:

> "For a preliminary injunction to issue, the party seeking the injunction must carry the burden of persuasion on four issues: (1) that he has no adequate remedy at law and will be irreparably injured if the injunction is not granted; (ii) that the threatened injury to him will be immediate, certain and great if the injunction is denied while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted; (iii) that he has a reasonable likelihood of prevailing on the merits of the case; and (iv) that granting the preliminary injunction will not have an injurious effect upon the general public."

In its April 16, 1981, order the trial court found that the plaintiffs had no

sufficient likelihood of success on the merits, had an adequate remedy at law and would not suffer irreparable injury by the denial of the preliminary injunction. The plaintiffs have not contested these findings, which themselves support the denial of the preliminary injunction even if the trial court had, in fact, erred in finding that the complaint failed to state a cause of action.

We therefore affirm the trial court's denial of the preliminary injunction and otherwise dismiss the appeal.

AFFIRMED IN PART, DISMISSED IN PART.

VAN DEUSEN, HOPF, JJ. SEIDENFELD, P.J.